

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

PETER QUINN ELVIK,

Petitioner,

vs.

DON BUNCE, *et al.*,

Respondents.

Case No. 3:04-cv-00471-GMN-WGC

**ORDER**

This action is a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, by a Nevada state prisoner represented by counsel, presently on appeal to the United States Court of Appeals for the Ninth Circuit. By order filed December 5, 2013, this Court conditionally granted habeas relief as to Ground 8 of the second amended habeas petition. (ECF No. 100). Before the Court is petitioner's motion for release pending resolution on appeal. (ECF No. 105).

**I. Procedural Background**

Following a jury trial in October 1996, petitioner Peter Quinn Elvik was convicted of first-degree murder with the use of a deadly weapon (Count I) and robbery with the use of a deadly weapon (Count II). On Count I, petitioner was sentenced to life imprisonment with the possibility of parole for first degree murder, and a consecutive sentence of life with the possibility of parole for use of a deadly weapon. On Count II, petitioner was sentenced to 48-150 months incarceration for robbery, with an equal and consecutive sentence for use of a deadly weapon. (Exhibit 78). Petitioner appealed his conviction to the Nevada Supreme Court and litigated a state habeas petition without success. (Exhibits 109 & 176). On August 31, 2004, petitioner filed a federal habeas petition in this Court. (ECF No. 2). Petitioner was appointed counsel and subsequently filed first and second amended petitions in December 2004 and January 2006. (ECF Nos. 8 & 42). On September 27, 2007, this Court dismissed the second amended petition as untimely. (ECF No. 60).

Petitioner successfully appealed the dismissal of his second amended petition to the Ninth

1 Circuit Court of Appeals. (ECF No. 65). A second round of litigation concerning procedural  
2 defense followed. On January 4, 2011, this Court determined that Grounds 3 and 4 were  
3 unexhausted and directed respondents to answer the remaining claims. (ECF Nos. 84 & 90).  
4 Respondents filed an answer (ECF No. 91) and petitioner, through counsel, filed a reply (ECF No.  
5 96). On December 5, 2013, this Court conditionally granted habeas relief to petitioner on Ground 8  
6 of the second amended petition. (ECF No. 100). Respondents filed a notice of appeal on December  
7 12, 2013. (ECF No. 102). On January 22, 2014, petitioner filed a notice of cross-appeal. (ECF No.  
8 107).

9 On January 6, 2014, petitioner filed a motion for release of petitioner pending the Court of  
10 Appeals' review of this Court's order granting habeas relief. (ECF No. 105). On January 16, 2014,  
11 respondents filed an opposition to the motion for release. (ECF No. 106). Petitioner filed a reply on  
12 January 22, 2014. (ECF No. 113).

## 13 **II. Discussion**

### 14 **A. FRAP 23(c) is Not Applicable**

15 Petitioner asserts that he is entitled to release pending appellate review of this Court's  
16 decision granting habeas relief. In support of this assertion, petitioner relies on Federal Rule of  
17 Appellate Procedure (FRAP) 23 and *Hilton v. Braunskill*, 481 U.S. 770 (1987). Specifically,  
18 petitioner argues that he is entitled to a presumption of release under FRAP 23(c) and that  
19 respondents have the burden of rebutting this presumption. FRAP 23(c) provides as follows:

20 While a decision ordering the release of a prisoner is under review, the  
21 prisoner must – unless the court or judge rendering the decision, or the  
22 court of appeals, or the Supreme Court, or a judge or justice of either  
court orders otherwise – be released on personal recognizance, with or  
without surety.

23 FRAP 23(c) is applicable where a federal court must determine the custody status of a prisoner who  
24 has been granted habeas relief, but no initial custody determination has been made by the district  
25 court. However, where an initial custody order has been made, such order “continues in effect  
26 pending review unless for special reasons shown to the court of appeals or the Supreme Court, or to  
27 a judge or justice of either court, the order is modified . . . .” FRAP 23(d). In the instant case, this  
28 Court has already made an initial custody determination in its order resolving the merits of the

1 habeas petition. The Court's order granting habeas relief provides as follows:

2 IT IS FURTHER ORDERED that the state court Judgment of  
3 Conviction is hereby VACATED and petitioner shall be released from  
4 custody within thirty (30) days of the later of the conclusion of any  
5 proceedings seeking appellate or certiorari review of the Court's  
6 judgment, if affirmed, or the expiration of the periods for seeking such  
7 appeal or review, unless the State files in this matter a written notice of  
8 election to retry petitioner within the thirty-day period to retry petitioner  
and thereafter commences jury selection in the re-trial within one  
hundred twenty (120) days following the filing of the notice of election  
to retry petitioner, subject to request for reasonable modification of the  
time periods in the judgment by either party pursuant to Rules 59 or 60  
of the Federal Rules of Civil Procedure.

9 (ECF No. 100, at pp. 44-45). As such, the presumption of release under FRAP 23(c) does not come  
10 into effect, because this Court has made an initial custody decision in its order granting habeas  
11 relief. Additionally, FRAP 23(d) provides:

12 An initial order governing the prisoner's custody or release, including  
13 any recognizance or surety, continues in effect pending review unless for  
14 special reasons shown to the court of appeals or the Supreme Court, or  
to a judge or justice of either court, the order is modified or an  
independent order regarding custody, release, or surety is issued.

15 It is FRAP 23(d)'s presumption that the initial custody order continues in effect unless the order is  
16 modified for "special reasons" by the Court of Appeals or the United States Supreme Court.  
17 Therefore, once the initial custody determination is made and Rule 23(d) applies, a motion to  
18 modify the custody order should not be considered by the district court, but by the Court of Appeals  
19 or the Supreme Court.

20 The holding of *Hilton v. Braunskill*, 481 U.S. 770 (1987), is not to the contrary. In  
21 *Braunskill*, a federal district court granted a habeas petition and ordered that petitioner be released  
22 unless the state afforded him a new trial within thirty days. 481 U.S. at 773. The government  
23 appealed the grant of habeas relief and moved to stay the district court's order pending the appeal.  
24 *Id.* The district court denied the government's motion to stay, finding that the government had  
25 failed to show that there was a risk the petitioner would not appear for subsequent proceedings. The  
26 Third Circuit Court of Appeals also denied the government's motion to stay the district court's order  
27 releasing the petitioner. *Id.* The United States Supreme Court vacated the Third Circuit with  
28 instructions to consider the traditional stay factors in evaluating the government's stay request. *Id.*

1 at 779. The *Braunskill* case addressed circumstances in which the government sought a stay of the  
2 initial custody determination. Here, however, the Court is presented with a habeas petitioner's  
3 request to modify the Court's initial custody determination. This Court must defer to the Ninth  
4 Circuit regarding the question of any change to petitioner's custody status in accordance with FRAP  
5 23(d).

6 **B. *Braunskill* Factors Weigh Against Any Change to Petitioner's Custody Status**

7 In his reply, petitioner argues that this Court retains jurisdiction over the custody of a habeas  
8 petitioner even after a notice of appeal has been taken from the order granting relief. *See Stein v.*  
9 *Wood*, 127 F.3d 1187, 1190 (9<sup>th</sup> Cir. 1997). To the extent that this Court has jurisdiction to consider  
10 petitioner's custody status, the Court considers the *Braunskill* factors. Where a court is "reviewing  
11 an initial custody determination pursuant to Rule 23(d)," the court "must accord a presumption of  
12 correctness to the initial custody determination made pursuant to Rule 23(c), whether that order  
13 directs release or continues custody, but that presumption, too, may be overcome if the traditional  
14 stay factors so indicate." *Braunskill*, 481 U.S. at 777. The traditional stay factors are: (1) whether  
15 the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether  
16 the applicant will be irreparably injured absent a stay; (3) whether the issuance of the stay will  
17 substantially injure the other parties interested in the proceeding; and (4) where the public interest  
18 lies. *Id.* at 776. The *Braunskill* Court stressed that this formula "cannot be reduced to a set of rigid  
19 rules," and determined that the reviewing court may also consider the possibility of flight, the risk  
20 that the prisoner will pose a danger to the public if released, and the State's interest in continuing  
21 custody or rehabilitation pending a final determination of the case on appeal. *Id.* at 77. This last  
22 factor "will be the strongest where the remaining portion of the sentence to be served is long, and  
23 weakest where there is little of the sentence remaining to be served." *Id.* The *Braunskill* Court  
24 stressed that with regard to his or her prospects for release, a successful habeas petitioner is in a  
25 considerably less favorable position than a pretrial arrestee," since the habeas petitioner "has been  
26 adjudged guilty beyond a reasonable doubt by a judge or jury, and this adjudication of guilt has been  
27 upheld by the appellate courts of the State." *Id.* at 779.

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1                   **1. Likelihood of Success on the Merits**

2           The first factor is whether respondents can show a strong likelihood of success on appeal, or  
3 failing this, a substantial case on the merits of their appeal. *See Braunskill*, 481 U.S. at 776, 778.  
4 This Court found a due process violation because the trial court failed to give petitioner's requested  
5 jury instruction regarding knowledge of wrongfulness. (ECF No. 100, at pp. 28-35). For children  
6 between the ages of eight and fourteen, the presumption pursuant to Nevada law is that they do not  
7 understand the wrongfulness of their actions. NRS 194.010. At the time the murder was  
8 committed, petitioner was fourteen years old. This Court found that the failure to give the  
9 knowledge of wrongfulness jury instruction constituted impermissible burden-shifting, as NRS  
10 194.010 creates an additional element that must be proven by the prosecution for each and every  
11 criminal offense alleged to have been committed in Nevada by a child between the ages of eight and  
12 fourteen. (*Id.*). This Court found that under either the *Brecht* or the *Chapman*/AEDPA test, failure  
13 to give this instruction was not harmless error. (*Id.*). In this Court's view, respondents do not have  
14 a strong likelihood of success on appeal. However, as discussed *infra*, other factors weigh against  
15 any change in petitioner's custody status pending appeal.

16                   **2. Danger to the Community**

17           The circumstances of petitioner's offense and petitioner's disciplinary history indicate that  
18 petitioner poses a danger to the community if released pending appeal. Petitioner was adjudged  
19 guilty of first degree murder with use of a deadly weapon by a Nevada jury. (Exhibit 78).  
20 Testimony at trial established that petitioner took a shotgun from his grandparents' home in Carson  
21 City and fired multiple shots at a 62-year old man, killing him, and then fled to California in the  
22 victim's vehicle. (Exhibit 109, at p. 3). Because this Court's decision to grant habeas relief was  
23 based not on a finding of petitioner's innocence, but on an instructional error that rendered his  
24 convictions unreliable, nothing about his successful petition undermines the significant danger he  
25 poses to the community due to his status as a convicted murderer. *See Braunskill*, 481 U.S. at 779.

26           Respondents have provided petitioner's prison disciplinary record with the response, which  
27 indicates that petitioner has engaged in a pattern of disruptive and violent behavior since his arrest  
28 in 1995. (ECF No. 106-1). The offenses for which petitioner was found guilty in prison include

1 fighting, disobedience, rioting, organizing work stoppages, threats, abusive language, and  
2 possession of contraband. Since 2008, petitioner has been found guilty of battery, possession of  
3 contraband, self-mutilation, property damage, unauthorized use of equipment or mail, and the  
4 possession or sale of intoxicants. (*Id.*). Petitioner's disciplinary record indicates repeated violations  
5 of institutional regulations. These circumstances, and his murder conviction, strongly indicate that  
6 petitioner poses a danger to the community. This weighs against any change in petitioner's custody  
7 status pending appeal.

### 8 **3. Risk of Flight**

9 Petitioner asserts that he has "strong family support and could live upon release in California  
10 with either his mother in Orange County or father in San Diego." Petitioner is serving consecutive  
11 life sentences, and these lengthy sentence support a finding that petitioner poses a flight risk, even  
12 assuming he has family support. This factor weighs against any change in petitioner's custody  
13 status pending appeal.

### 14 **4. State's Interest in Continued Custody**

15 The State of Nevada has a significant interest in petitioner's continued confinement.  
16 Petitioner is now 33 years old and is serving consecutive life sentences for first degree murder. (*See*  
17 Exhibit 78). Unless petitioner is paroled, or the State is unsuccessful in both its appeal and in  
18 retrying petitioner, he still has many more years left in custody. The length of petitioner's  
19 sentences, the time remaining on those sentences, and the gravity of petitioner's crimes weigh  
20 against any change in petitioner's custody status pending appeal.

### 21 **5. Remaining Factors**

22 The remaining traditional factors for consideration are as follows: (1) whether the applicant  
23 will be irreparably injured absent a stay; (2) whether the issuance of the stay will substantially injure  
24 the other parties interested in the proceeding; and (3) where the public interest lies. *Braunskill*, 481  
25 U.S. at 776.

26 Petitioner offers these facts for the Court's consideration of the remaining factors: Petitioner  
27 states that he has served more than 18 years in prison and that he has completed his high school  
28 diploma, GED, and earned approximately 55 college credits during his incarceration. Petitioner

1 cites his family, who live in California and have indicated their ability to house petitioner in either  
2 Orange County or San Diego, if petitioner is released. Petitioner cites the fact that he could assist  
3 with the family automotive repair business. Petitioner states that he does not have a passport.  
4 Petitioner submits letters in support of his release from the following: California attorney Matt  
5 Kurilich; his step-father, Chuck Congdon; his sister Summer Bentley; his friend, Matthew Norberg;  
6 his former neighbor Jack Norberg; and his mother, Brenda Howell. (ECF No. 105, Exhibits 1-6).

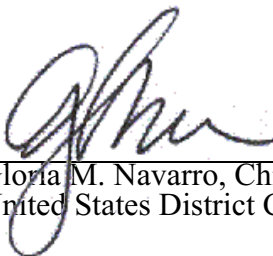
7 The Court has considered all arguments and evidence submitted by petitioner, but finds that  
8 none are sufficient to overcome the presumption that the initial custody order, found at pages 44-45  
9 of the Court's order of December 5, 2013, is correct. (ECF No. 100). Due to the gravity of his  
10 crime and the danger he poses to the community, the Court finds that it is in the public's best  
11 interest that petitioner remains in the custody pending appeal, pursuant to this Court's initial custody  
12 order. Petitioner's motion for release pending appeal is denied.

### 13 **III. Conclusion**

14 **IT IS THEREFORE ORDERED** that petitioner's motion for release pending resolution on  
15 appeal (ECF No. 105) is **DENIED**.

16 **IT IS FURTHER ORDERED** that petitioner's custody status, as set forth in this Court's  
17 initial custody determination, found at ECF No. 100, at pp. 44-45, **REMAINS IN FULL EFFECT**.

18 **DATED** this 19th day of June, 2014.

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Gloria M. Navarro, Chief Judge  
United States District Court